(25,777)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 410.

PIERCE OIL CORPORATION, PLAINTIFF IN ERROR,

vs.

THE CITY OF HOPE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX.

	Original.	Print
Transcript of record from the Hempstead chancery court	1	1
Caption	2	1
Complaint	3	2
Exhibit A—Ordinance No. 310, approved February 1, 1916	10	5
Memorandum as to summons	12	6
Order filing demurrer	13	6
Demurrer	14	6
Order sustaining demurrer	15	7
Fee bill	16	8
Clerk's certificate	17	8
Order of submission	19	9
Judgment	20	9
Opinion, Smith, J.	21	10
Order submitting petition for rehearing	28	13
Petition for rehearing	29	13

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	Original.	Print
Order overruling petition for rehearing	32	15
Order restoring injunction	33	15
Bond on injunction	35	16
Clerk's certificate	37	17
Assignment of errors	38	17
Petition for writ of error	40	18
Bond on writ of error	42	20
Writ of error	43	20
Certificate of lodgment	45	22
Citation and service	46	22
Clerk's return to writ of error	47	23
Statement of costs	47	23

1 *Style of Case.*

Transcript from the Hempstead Chancery Court, March Adjourned Term, 1916.

#745.

PIERCE OIL CORPORATION, Plaintiff,

vs.

CITY OF HOPE, Defendant.

Petition for Injunction to City Ordinance.

Rose, Hemingway, Cantrell, Loughborough & Miles, Attorneys for Appellant.
O. A. Graves, Attorney for Appellee.

2 *Caption.*

Pleas Before the Honorable James D. Shaver, Chancellor of the Sixth Chancery District of Arkansas, on the 1st Day of July, 1916, a Day of the Regular Term of said Court.

#745.

PIERCE OIL CORPORATION, Plaintiff,

vs.

CITY OF HOPE, Defendant.

Application for Injunction Order to City Ordinance.

Caption.

The following proceedings were had and done in said cause, to-wit:

3 *Complaint.*

In the Hempstead Chancery Court.

PIERCE OIL CORPORATION, Plaintiff,

vs.

CITY OF HOPE, Defendant.

Complaint.

For cause of action plaintiff states that it is a corporation duly organized under the laws of the State of Virginia, and duly authorized to do business in the State of Arkansas. Defendant is a duly incorporated city of the state of Arkansas. That it is authorized among other things to refine or produce and to sell the products of petroleum, including oil and gasoline. That it succeeded by purchase to the good will, assets and business of the Waters-Pierce Oil Company, a corporation organized under the laws of the State of Missouri, and for many years authorized to do business in this State, and conducted in this State business consisting of the sale of petroleum products, including oil and gasoline. That for many years the Waters-Pierce Oil Company, predecessor of plaintiff, conducted its business in the City of Hope, among other places within this State. That its business at Hope consisted in part of bringing oil from other States in tank cars, transferring *to* from such tank cars to storage tanks, and selling from the storage tanks to patrons in the said city and vicinity.

That when the plaintiff succeeded to the business of the
4 said Waters-Pierce Oil Company it continued to conduct it in Hope as it had been conducted by its predecessor, as above set out. For the purpose of conducting its business it has five storage tanks located on the right-of-way of the St. Louis & San Francisco Railroad in the City of Hope. For a great many years these tanks were located on the right-of-way of the St. Louis, Iron Mountain & Southern Railway Company. As the city grew, buildings were erected in the neighborhood of the tanks as then located; and at the request of the town authorities, and in accordance with the general plan for the development of the town, the tanks were moved to their present location. There were then no buildings in their immediate vicinity, and their location was fixed to meet the wishes of the City officials and the people of the town generally.

The tanks above referred to are constructed of steel, raised upon concrete or brick foundation, and have dome vents for the escape of any gas that may form in them An explosion is impossible with the escapes provided; and in case of fire on the outside which heated the contents of the tanks, the only combustion possible would be the gas which escaped from them, and such fire would not be sufficient to spread to any buildings that are now in the neighborhood of or adjacent to the tanks. Under the present conditions the presence of

these tanks in no way endangers the buildings or structures that are nearest to them or any other buildings or structures in the City of Hope. They are a necessary adjunct to the conduct of the
5 business of selling petroleum products in Hope and vicinity.

Petroleum products are brought to the City of Hope in tank cars and from them loaded into the storage tank by means of iron pipes connecting them. The stored products are sold by transferring them through an iron pipe from the storage tanks to the inside of a warehouse, where, through val-es, it is emptied into delivery cans or iron barrels for delivery to customers in the town and tributary country. The contents are not exposed in their transfer to the storage tanks, or from the storage tanks to the containers used in making delivery.

The City Council of the City of Hope, by ordinance passed February 1st, 1916, made it unlawful to keep or store in tanks or otherwise, any petroleum, nap-tha, benzine, gasoline, coal oil or any other of the products of petroleum or any inflammable or explosive oils, gas or substance within the space of three hundred feet of any dwelling house, storeroom, building, barn, shed or other like structure, within the corporate limits of the City of Hope in any quantity greater than 60 gallons at one time, with the proviso that underground tanks are permitted to carry not exceeding six hundred gallons at one time; and it further provided that every person, firm or corporation violating the provisions of the ordinance should be deemed guilty of a misdemeanor, and upon conviction should be fined in any sum not less than $25.00 or more than $500.00, and that each and every day's violation of the ordinance should constitute a separate offense.
6 A copy of the ordinance is herewith filed as an exhibit.

The plaintiff alleges that the ordinance is void because it is wholly unreasonable and unnecessary, and it operates to deprive the plaintiff of property lawfully acquired, to put it to a large unnecessary expense, and to reduce the profits to which it is entitled in the conduct of its business.

The plaintiff knows of no available location within the City of Hope at which tanks could be located and oil stored without violating the terms of the ordinance. Although there are buildings and structures within three hundred feet of the tanks as located, neither such buildings nor structures nor persons using them are in any way imperiled by the presence of the tanks. In order that plaintiff continue its business and comply with the ordinance it will be necessary to change the location of its tanks, to move them, to move the warehouse used in connection with them, erect new piers for the tanks and warehouse, and reset the tanks and warehouse upon the new piers. The expense of this removal would not be less than $800.00, possibly more, dependent upon the distance of the new location from the old.

The plaintiff has a lease from the St. Louis & San Francisco Railroad Company authorizing it to maintain its tanks at the present location for a nominal consideration. They are so located that tank cars can be brought and placed beside them so that the product of the tank cars can be transferred to the storage tanks through pipes, and
7 without the cost of drayage or freight charges in addition to the regular carload charges to Hope. If the plaintiff is re-

quired to remove its tanks, the value of its lease and present location would be entirely destroyed.

The plaintiff's business at Hope at present amounts to about one tank car a month. It would be impracticable to conduct this business without the use of storage tanks so located as to receive the product directly from the tank cars in the manner above set out. If plaintiff is required to abandon its present location, it knows of no place where it can get another with the same or equal facilities; and to do so will require a considerable expenditure, and thereby cost the plaintiff a large sum of money.

After the passage of the ordinance above set out, in order to prevent friction between plaintiff and the officials of the defendant city, the plaintiff stopped selling from the storage tanks, and has conducted its business by means of barrels and other small retainers. This has involved an additional cost of at least seventy-five cents per barrel of the products sold, amounting to approximately $75.00 per month. If the plaintiff can secure a location for its tanks outside the city limits, and continue its business by deliveries from the tanks as they are now made, it will be required to make a much longer haul from the tank to the purchaser than is now made, which will entail an additional expense in the business of not less than $25.00 per month.

8 Plaintiff alleges that the enforcement of the ordinance was by resolution of the council of the defendant city suspended until about the 1st day of July, next. The plaintiff has hoped that during this time an agreement might be reached whereby the council would permit it to continue its business as it has heretofore been conducted; but it has wholly failed to reach an agreement to that effect, although it has faithfully endeavored to do so. Although the enforcement of the ordinance is wholly unnecessary to the security of life or property, and the location of the storage tanks and their use by the plaintiff as they are used does no damage to either person or property in the City of Hope, the defendant threatens to stop the conduct of the business, to have the agents and employees of the plaintiff, the drivers of its wagons arrested for a violation of the ordinance, unless the plaintiff complies with its provisions on or before July, next.

Such enforcement would seriously interfere with the conduct of plaintiff's business, and to a large extent prevent its being conducted, put it to a great unnecessary expense, and deprive it of its property and of the profits to which it is entitled in the conduct of its business, without in any way promoting the safety of the inhabitants of the defendant city, or of their property.

The ordinance is in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, and of the State of Arkansas, and is wholly void, and its enforcement will deprive the plaintiff of its property without due process of law.

9 The premises considered, plaintiff prays that the ordinance be held to be null and void, and that the defendant, its officials and employees, be permanently enjoined from taking any steps to enforce the ordinance, either by instituting prosecutions, as is therein provided, or by interfering in any other manner in the conduct of

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plaintiff's business; and to the end that the plaintiff may suffer no detriment pending the final decision of this cause. plaintiff prays for a temporary injunction as above set out, and for all other and further relief.

ROSE, HEMINGWAY, CANTRELL, LOUGHBOROUGH & MILES,
Attorneys for Plaintiff.

STATE OF ARKANSAS,
County of Pulaski:

W. Holt Harris, being duly sworn, says that he is the Assistant Manager of the plaintiff corporation, and that the allegations of the foregoing complaint are true as he verily believes.

W. HOLT HARRIS,
Ass't Mg'r.

Sworn to and subscribed before me this 13th day of June, 1916.

[SEAL.] ARTHUR COUNTS,
Notary Public.

My commission expires Oct. 19, 1919.

Filed and summons issued this the 15th day of June, 1916. G. E. Bailey, Circuit Clerk. By O. C. Bailey, D. C.

10 *Ordinance—Exhibit "A."*

(Copy.)

Ordinance No. 310.

An Ordinance Entitled "An Ordinance for the Better Protection, Safety, and Preservation of the Propert-, Health, Peace and Lives of the Inhabitants of the City of Hope, Arkansas, and for Other Purposes.

Be it ordanied by the City Council of the City of Hope, Arkansas:

Section 1. That hereafter it shall be unlawful for any person, persons, firm or corporation, to keep or store in tanks or otherwise, any petroleum, nap-tha, benzine, gasoline, coal-oil, or any other of the products of petroleum, or any other inflammable or explosive oils, gas or substance, within the space of three hundred (300) feet of any dwelling house, store room, building, barn, shed, or other like structure of any person within the corporation limits of the said City of Hope, in a quantity greater than sixty (60) gallons at one time, provided that underground tanks may be permitted to carry not exceeding six hundred (600) gallons at one time.

Section 2. That each and every person, firm or corporation violating Section One of this Ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined in any sum not

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less than Twenty-five Dollars ($25.00) nor more than Five Hundred Dollars ($500.00), and each and every day's violation of this
11 Ordinance shall constitute a separate offense.

Section 3. That all ordinances and parts of Ordinances in conflict herewith be and the same are hereby repealed and this Ordinance shall be in full force and effect from and after 45 days after its passage and publication.

Passed and approved this the 1st day of February, 1916.

Published in the Star of Hope, February 2nd, 1916.

T. B. BOWDEN, *Mayor.*

Attest:
FRED WEBB, *Recorder.*

Exhibit "A.'

12 *Summons.*

Service.

Summons issued June 15th, 1916.
Summons served June 16th, 1916.

13 *Filing Demurrer.*

In the Hempstead County Chancery Court.

#745.

PIERCE OIL CORPORATION, Plaintiff,

v.

CITY OF HOPE, Defendant.

SATURDAY, July 1st, 1916.

Comes the defendant by its attorney, O. A. Graves, and files herein his demurrer to the complaint of the plaintiff.

(See Chancery Record L, page 161.)

14 *Demurrer.*

In the Hempstead Chancery Court.

PIERCE OIL CORPORATION, Plaintiff,

vs.

CITY OF HOPE, Defendant.

Comes the defendant and demurs to the complaint herein and for cause says:

Because the complaint does not state facts sufficient to constitute a cause of action.

Because the complaint does not state facts sufficient to entitle the plaintiff to an injunction.

Because the complaint does not state facts sufficient to entitle the plaintiff to a temporary restraining order.

Because neither paragraph of the complaint does not state facts sufficient to constitute a cause of action or to entitle the plaintiff to either a temporary or permanent restraining order.

Wherefore, defendant prays that the complaint be dismissed and for all other proper and equitable relief.

O. A. GRAVES,
Attorney for Defendant.

Filed this 1 day of July, 1916. G. E. Bailey, Clerk. By O. C. Bailey, D. C.

15 *Order Sustaining Demurrer.*

In the Hempstead County Chancery Court.

#745.

PIERCE OIL CORPORATION, Plaintiff,

vs.

CITY OF HOPE, Defendant.

SATURDAY, July 1st, 1916.

On this 1st day of July, A. D. 1916, the above cause comes on to be heard upon general demurrer filed by defendant to plaintiff's complaint and the Court, after argument of counsel and being well and sufficiently advised does sustain said demurrer, to which action of the Court plaintiff excepts. Plaintiff elects to stand upon said complaint and it is by the Court ordered that the cause of action be dismissed.

To which action of the Court plaintiff excepts and prays an appeal to the Supreme Court, which is allowed.

(See Chancery Record L, page 161.)

16 *Fee Bill.*

STATE OF ARKANSAS,
County of Hempstead, ss:

In the Chancery Court Thereof.

#745.

PIERCE OIL CORPORATION, Plaintiff,

v.

CITY OF HOPE, Defendant.

Dismissed.

To G. E. Bailey, Clerk	$5.90
To R. A. Boyett, Sheriff	.60
To G. E. Bailey, Clerk for making this transcript	6.00
Total	$12.50

STATE OF ARKANSAS,
County of Hempstead, ss:

I, G. E. Bailey, Clerk of the Chancery Court in and for said County and State, do hereby certify that the above statement of cost is correct as the same appears on Chancery Fee Book "J", at page 105, and that the sum of $5.00 has been paid by the plaintiff herein.

Witness my hand and seal of said Court this 3rd day of July, 1916.

[SEAL.] G. E. BAILEY,
Clerk of the Chancery Court, Hempstead County, Arkansas.

17 *Certificate.*

STATE OF ARKANSAS,
County of Hempstead:

I, G. E. Bailey, Clerk of the Circuit and Chancery Courts in and for the County and State aforesaid, do hereby certify that the annexed and foregoing thirteen (13) pages of typewritten matter, besides this one, is a true, complete and perfect transcript of all the pleadings, original papers and record entries in the case as shown in the Caption hereof as the same appears from the records of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of Hope, Hempstead County, Arkansas, this 3rd day of July, 1916.

[SEAL.] G. E. BAILEY,
Clerk of the Circuit Court and Chancery Courts, Hempstead County, Ark.

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18 *Filing in Supreme Court.*

Hempstead Ch'y.

No. 4387.

PIERCE OIL CORPORATION, Appellant,

vs.

CITY OF HOPE, Appellee.

Jas. D. Shaver, Ch..... $11.50

Transcript filed July 5, 1916.

W. P. SADLER, *Clerk*,
By J. H. CAMPBELL, *D. C.*

19 *Submission in Supreme Court.*

STATE OF ARNANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 27th day, being the fourth Monday of November, A. D. 1916, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 18th day of December, 1916.

PIERCE OIL CORPORATION, Appellant,

vs.

CITY OF HOPE, Apellee.

Appeal from Hempstead Chancery Court.

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record and the briefs filed, and is by the court taken under advisement.

20 *Judgment of Supreme Court.*

November Term, 1916,

(Caption Omitted.)

January 1, 1917.

This cause came on to be heard upon the transcript of the record of the Chancery Court of Hemstead County, and was argued by

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solicitors, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said Chancery Court in this cause.

It is therefor ordered and decreed by the Court that the decree of said Chancery Court in this cause rendered be, and the same is hereby in all things affirmed with costs.

It is further ordered and decreed that said appellee recover of said appellant all its costs in this Court in this cause expended, and have execution thereof.

21 *Opinion of Supreme Court.*

In the Supreme Court of Arkansas, Jan'y 1, 1917.

No. 74.

PIERCE OIL CORPORATION

v.

CITY OF HOPE.

Opinion.

SMITH, *J.*:

This is a suit in equity brought by appellant to enjoin the enforcement of an ordinance of the City of Hope, it being contended by appellant that the ordinance evidences a wrongful exercise of the police powers of that municipality. A general demurrer to the complaint was sustained, and this appeal questions the sufficiency of said complaint and demurrer.

The material allegations of the complaint are as follows: That appellant is a business corporation engaged in selling gasoline and oil, and for a great many years has owned and used storage tanks in the Town of Hope in connection with the sale of its products. That the tanks were once moved at the request of the town authorities and "their location was fixed to meet the wishes of the city officials and the people of the town generally." That the tanks are so constructed with dome vents for the escape of gas that an explosion is impossible and that in case of fire "the only combustion would be the gas which escaped from them and such fire would not be sufficient to spread to any buildings that are now in the neighborhood of or adjacent to the tanks," and that the presence of these tanks in no way endangers any other building or structures in the City of Hope, and that in transferring the products from the railroad cars to the tanks such

22 products pass through valves and pipes and are never exposed.

That said tanks are a necessary adjunct to the conduct of appellant's business in selling petroleum products in Hope and vicinity, and that appellant knows of no available location within the City of Hope at which tanks could be erected and oil stored without violating the terms of said ordinance, and if said ordinance is enforced appel-

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lant will be compelled to move its tanks at a cost of $800.00 and suffer a severe loss in the daily sale of its products as well as lose a most valuable lease which it now has for a nominal sum. There was also an allegation that the ordinance was violative of the Constitution of this State and in contravention of the 14th Amendment to the Constitution of the United States, and that its enforcement would deprive it of its property without due process of law.

The ordinance so sought to be enjoined prohibited the keeping of gasoline or any of the other products of petroleum, or any other inflammable or explosive oil, gas or substance, within 300 feet of any dwelling-house, store-room, or other like structure, within the corporate limits of said city, in a quantity greater than 60 gallons at one time, with a proviso that underground tanks would be permitted to carry not to exceed 600 gallons at one time. The violation of the ordinance was made a misdemeanor, and a fine of not less than $25.00 nor more than $500.00 was prescribed for each violation of its provisions.

It is argued for the reversal of the decree below that the ordinance is arbitrary, unnecessary and unreasonable, and that no authority for its enactment has been conferred, or could be conferred, by
23 the Legislature upon the councils of the cities and towns of the State. The allegation that the tanks were once moved at the request of the town authorities and "their location was fixed to meet the wishes of the city officials and the people of the town generally" is not clear as to the manner in which the town authorities made the request for the removal of the tanks. But, assuming even that it was done by ordinance, that fact would not estop the City from passing the ordinance here under consideration if the City otherwise has the power to do so. In the case of Davenport v. City of Richmond, 81 Va. 636, the Supreme Court of that State held that an ordinance, requiring the removal of powder magazines from a city, is valid, although the city had sold the sites to the owners for the purpose of erecting such magazines. In this case it was said.

"However difficult it may be, if it is possible at all, to exactly define the limits of that power (the police power), there is no doubt that it extends to the protection of the lives, health, morals and safety of all persons in the community, and that it cannot, by contract or otherwise, be parted with by a municipal corporation to which it may be delegated."

In support of its decision that a municipal corporation cannot, by contract, abridge its legislative powers, the court quoted with approval from the case of Presbyterian Church v. Mayor, etc. of New York, 5 Cow. 538, the following statement of the law:

"The defendants are a corporation. * * * They are considered a person in law within the scope of their corporate powers and are subject to the same liabilities and entitled to the same
24 remedies for the violation of contracts as natural persons. They are also clothed with legislative powers and, in the capacity of a local legislature, are particularly charged with the care of public morals and the public health within their own jurisdiction.

"In ascertaining their rights and liabilities as a corporation, as an individual, we must not consider their legislative character. They

had no power as a party to make a contract which should control or embarrass their legislative powers and duties. Their enactments in their legislative capacity are to have the same effect upon their individual acts as upon those of any other person or the public at large, and no other effect.

"The liability of the defendants, therefore, upon the covenant in question must be the same as if it had been entered into by an individual, and the effect of the by-laws upon it the same as if that by-law had been an Act of the State Legislature. It is expressly authorized by the Legislature, and whether it be their act or the fact of the local legislature makes no difference."

Section 5438 of Kirby's Digest confers authority upon municipal corporations "to prevent injury or annoyance within the limits of the corporation, from anything dangerous, offensive or unhealthy" and "to regulate the keeping and transportation of gunpowder, dynamite, and other combustibles, and to provide or license magazines for the same."

Section 5439 gives power "to make regulations for the purpose of guarding against accidents by fire."

We think these sections afford authority for the ordinance in question.

25 It must be, and is conceded that the action of the council in passing ordinances of this character is presumed to be legal until the contrary is made to appear, and while the action of the council is subject to judicial review, yet in so far as a discretion abides as to the manner and extent of the use of the power conferred by the statute, that discretion is to be exercised by the council to which the power is conferred, and no- by the court which reviews its action, and the courts may set aside the action of the council only when they can say that the council has acted in an arbitrary or unreasonable manner.

It may be true that appellant has provided the facilities which, if properly and carefully used, will render their tanks harmless; but this is also probably true of any other explosive or inflammable substance. But it is a matter of which we may take judicial notice that disastrous explosions have occurred for which no satisfactory explanations have ever been offered. The unexpected happens. Some simple precaution was omitted. The City has the right to enact proper ordinances to control such contingencies.

In the case of Standard Oil Co. v. City of Danville, 64 N. E. 1110, the Supreme Court of Illinois sustained an ordinance of the City of Danville prohibiting the keeping of explosive oils within 1,000 feet of any dwelling, store-room, etc., or other like structure, in a quantity greater than 5 barrels of 50 gallons each. It was contended there, as here, that the plant was harmless; that the houses within the prohibited distance had been erected after the plant itself had been

26 erected, and that the ordinance was unreasonable and void. Disposing of these contentions the Supreme Court of Illinois said:

"The fact that the greater number of residences, business houses, etc., now within 1,000 feet of the plant of the appellant company were

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built after the plant had been located at its present site, does not entitle the appellant company to insist that it has become invested with the right to continue to operate its plant and keep on storage the inflammable, explosive and offensive oils, liquids and substances specified in the ordinance. The health, safety and comfort of the people are the controlling considerations, and prescriptive rights to endanger either cannot be acquired. As the limits of the inhabitable parts of cities extend, establishments that endanger health, safety or comfort of the population of such extended portion of the city and become nuisances, may be required to be removed to other localities. Powder Co. v. Turney, 131 Ill. 322, 23 N. E. 389; 7 L. R. A. 262, 19 Am. St. Rep. 34." See, also, In re McIntosh, 211 N. Y. 265; 105 N. E. 414.

Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community. Dobbins v. Los Angeles, 195 U. S. 223; Dryfus v. Boone, 88 Ark. 360. And when this is done with the ordinance in question we are unable to
27 pronounce it void, and the decree of the court below sustaining the demurrer is, therefore, affirmed.

28 *Filing Petition for Rehearing.*

November Term, 1916.

(Caption Omitted.)

January 22, 1917.

The appellant by its solicitors having filed a petition for rehearing within the time allowed by law, and served the same, it is now submitted and by the Court taken under advisement.

29 *Petition for Rehearing.*

In the Supreme Court of Arkansas.

PIERCE OIL CORPORATION, Appellant,

vs.

CITY OF HOPE, Appellee.

Petition for Rehearing.

Comes appellant, Pierce Oil Corporation, by its counsel, Rose, Hemingway, Cantrell, Loughborough & Miles, and moves the Court to grant it a re-hearing in the above entitled cause, and as grounds therefor says:

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1. The Court erred in its opinion in deciding the case on facts extraneous to those alleged in the complaint.

2. The opinion of the Court denies the appellant's rights granted it by the provisions of the Fourteenth Amendment to the Constitution of the United States.

The above case was presented to this Court upon the bill of complaint and the demurrer thereto. Appellant contended that the lower court erred in sustaining demurrer to the bill. It has been many times decided by this Court that, when the sufficiency of a complaint is tested by demurrer, all of the allegations of the complaint, and the reasonable inferences to be drawn therefrom, are confessed. This is a simple rule, with which every lawyer is familiar, and which we do not believe this Court intends to change.

30 In the case at bar, there is no specific statutory enactment conferring a jurisdiction upon the city council to regulate the storing of gasoline and oil. The statute cited by the Court in its opinion was passed in 1901, at a time when the grade of gasoline used in propelling automobiles was not in use in this State. If there had been a specific statute in the State on the subject of oils and gasoline, the Court might well say in its opinion that there had been a legislative finding; but, in the absence of such a specific statute, there remains a question of fact to be tried on proper allegations, as to whether or not the products referred to are explosive in the form in which they are handled, or whether or not they are dangerous or offensive. The complaint says definitely and specifically that they are not; that as handled they are no more dangerous than coal or wood and the materials out of which the nearby buildings are constructed. If the Court can say that the products which appellant handled are dangerous, it would have to go so far in its judicial notice as to say that there are various grades of gasoline; that there are highly explosive kinds of gasoline, such as casing-head gasoline, and to say that appellant uses and handles this sort of stuff. While appellant alleges in its complaint in this case that the articles which are handled in its tanks in the City of Hope are not dangerous nor offensive; and the appellant states that the manner in which they are handled makes an explosion impossible.

We believe that the legal and correct method would be for appellee to refute these facts with testimony of witnesses, and

31 for this Court to give appellant a c*j*ance to show that the facts alleged are true; and we believe that the court should not leave the record as made up and decide that the articles handled by appellant are dangerous in the absence of a specific legislative finding to that effect.

The facts alleged in appellant's complaint, if true,—and the demurrer admits their truth,—plainly describe a business which, if destroyed by legislative enactment such as set up in the complaint, would be one that would bring about the destruction of property without due process of law.

ROSE, HEMINGWAY, CANTRELL,
LOUGHBOROUGH & MILES,
Attorneys for Appellant.

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I, Vincent M. Miles, certify that I have read the above and foregoing petition on re-hearing, and that I am one of the counsel for appellant; and that the petition for rehearing is not filed for the purpose of delay, but is filed in good faith, and to the end that substantial justice may be done the appellant.

VINCENT M. MILES.

Filed Jan'y 17, 1917. W. P. Sadler, Clerk.

32 *Order Overruling Petition for Rehearing.*

November Term, 1916.

(Caption Omitted.)

January 29, 1917.

Being fully advised the petition for rehearing filed in this cause, is by the court overruled.

33 *Order Restoring Injunction.*

In the Supreme Court of Arkansas.

PIERCE OIL CORPORATION, Appellant,

vs.

CITY OF HOPE, Appellee.

This cause coming on to be heard this the 5th day of February, 1917, upon the application of the Pierce Oil Corporation for a writ of error from the Supreme Court of the United States to review the judgment of this court heretofore entered on the 1st day of January, 1917, and the said writ of error, having been allowed by the undersigned Edgar A. McCulloch, Chief Justice of the Supreme Court of Arkansas, it is ordered that the injunction granted pending the determination of the cause in the Supreme Court of Arkansas be restored during the pendency of the cause in the Supreme Court of the United States, and that the defendant, its officers and representatives, be restrained from proceeding to enforce against the Pierce Oil Corporation Ordinance numbered 310 of the Ordinances of the City of Hope, being the ordinance attacked in this cause; provided that the injunction shall not become effective until the plaintiff in error files a bond payable to the City of Hope with the Clerk of this Court, with good and sufficient surety to be approved by him, in the sum of Ten Thousand Dollars, conditioned that the Pierce Oil Corporation will pay, within thirty days after accrual, all demands that may arise on account of damage to person or property caused either by fire or explosion in the tanks of the said corporation while being kept in
34 the City of Hope contrary to the provisions of said ordinance. And upon the filing and approval of a bond as above provided,

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the injunction dissolved by the judgment of the Supreme Court of Arkansas, shall be restored and become effective. This the 5th day of February, 1917.

E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed February 5, 1917. W. P. Sadler, Clerk. By J. H. Campbell, D. C.

35 *Bond on Injunction.*

In the Supreme Court of the United States.

PIERCE OIL CORPORATION, Plaintiff in Error,

vs.

CITY OF HOPE, Defendant in Error.

Bond.

Whereas, on this 5th day of February, 1917, a writ of error from the Supreme Court of the United States was duly allowed from the judgment of the Supreme Court of Arkansas by the Honorable Edgar A. McCulloch, Chief Justice of said Court:

And whereas, At the time of such allowance the said Honorable Edgar A. McCulloch made an order that the injunction granted pending the determination of the cause in the Supreme Court of Arkansas be restored during the pendency of the cause in the Supreme Court of the United States, and that the defendant, its officers and representatives, be restrained from proceeding to enforce against the Pierce Oil Corporation Ordinance No. 310 of the Ordinances of the City of Hope, being the ordinance attacked in this cause, on condition that the Pierce Oil Corporation file a bond payable to the City of Hope, with the Clerk of the Supreme Court of Arkansas, with good and sufficient surety, to be approved by him, in the sum of Ten Thousand Dollars, conditioned that the said Pierce Oil Corporation would pay within thirty (30) days after accrual all demands that may arise on account of damage to person or property, caused by either fire or explosion in the tanks of the said Pierce Oil Corporation while
36 such tanks were kept in the City of Hope contrary to the provisions of said ordinance;

Now, therefore, the undersigned Pierce Oil Corporation, as principal, and the American Surety Company, as surety, acknowledge ourselves indebted to the City of Hope in its own behalf and for the benefit of any person who may sustain damages as hereinafter set out, in the penal sum of Ten Thousand Dollars, to the payment of which we bind ourselves and our successors and representatives firmly by these presents. But this obligation is on condition, however, that if the said Pierce Oil Corporation shall pay within thirty (30) days after accrual any and all demands that may arise to any person on account of damage to person or property caused by fire or explosion

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in the tanks of the said Pierce Oil Corporation while being kept in the City of Hope contrary to the provisions of said ordinance, then this obligation to be void; otherwise to remain in full force and effect.

In testimony whereof, the parties have hereunto set their hands and seals this 5th day of February, 1917.

PIERCE OIL CORPORATION,
By W. HOLT HARRIS, *Mgr.*

[SEAL.]

AMERICAN SURETY COMPANY,
By J. T. TUNNAH, *Agent.*
By HORACE CHAMBERLIN,
Countersigner.

Approved Feb'y 5, 1917.

W. P. SADLER,
Clerk Supreme Court of the State of Arkansas.

37 *Certificate to Transcript.*

SUPREME COURT,
State of Arkansas, ss:

I, W. P. Sadler, clerk of said court, do certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Pierce Oil Corporation, Appellant, vs. City of Hope, Appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this February 7th, 1917.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL,
Deputy Clerk.

38 *Assignment of Errors, &c.*

Supreme Court of the United States.

PIERCE OIL CORPORATION, Plaintiff,

v.

CITY OF HOPE, Defendant.

Assignment of Errors and Prayer for Reversal.

The said Pierce Oil Corporation having filed its application for a writ of error to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Arkansas, rendered on

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the 1st day of January, 1917, affirming the judgment of the Chancery Court of the Sixth Chancery Circuit of Arkansas, which dismissed the bill of complaint filed on its behalf against the City of Hope, seeking to enjoin the said City of Hope from enforcing an ordinance numbered 310 and entitled, "An Ordinance for the better protection, safety and preservation of the property, health, peace and lives of the inhabitants of the City of Hope, Arkansas, and for other purposes," enacted by the said City of Hope on February 1, 1916, your petitioner, the said Pierce Oil Corporation, hereby assigns the following errors:

First. By the said ordinance and the judgment of the said Supreme Court sustaining the said ordinance and dismissing your petitioner's bill of complaint, which sought to enjoin the enforcement thereof as against it, your petitioners, and will be, deprived of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

39 Second. By the said ordinance and the decree of the Supreme Court sustaining the same, your petitioner is denied the right of property claimed and relied upon in said cause, under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Your petitioner therefore prays that the judgment of the Supreme Court of the State of Arkansas rendered on the 1st day of January, 1917, be reversed and set aside.

ROSE, HEMINGWAY, CANTRELL, LOUGHBOROUGH & MILES.

Filed Feb'y 5, 1917. W. P. Sadler, Clerk. By J. H. Campbell, D. C.

40 *Petition for Writ of Error.*

Supreme Court of the United States.

PIERCE OIL CORPORATION, Plaintiff,

v.

CITY OF HOPE, Defendant.

To the Honorable Edgar A. McCulloch, Chief Justice of the Supreme Court of the State of Arkansas:

Your petitioner respectfully shows that on the — day of ——, 1916, it filed its complaint in the Chancery Court of Hempstead County, against the City of Hope, wherein it prayed for a decree enjoining the City of Hope from taking any steps to enforce an ordinance enacted by its Council, being Ordinance #310, entitled, "An Ordinance for the better protection, safety and preservation of the property, health, peace and lives of the inhabitants of the City of Hope, Arkansas, and for other purposes." That as a ground for injunction, it was alleged in the complaint, among other things, that

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the Ordinance would deprive it of its property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and was for that reason wholly void. That the City of Hope, defendant in said cause appeared in said Chancery Court of Hempstead County, and filed its demurrer to the complaint, wherein it asks that the complaint be dismissed because it did not state facts sufficient to constitute a cause of action. Your petitioner appealed from the judgment of the Chancery Court to the Supreme Court of the State of Arkansas, contending that the said Ordinance of the City of Hope and the judgment of the Chancery Court refusing it an injunction, and sustaining the ordinance,
41 would deprive it of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. The said Supreme Court, on the 1st day of January, 1917, affirmed the judgment of the Chancery Court, and held that the said Ordinance of the City of Hope did not deprive it of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States; all of which will appear by transcript of the proceedings in said cause herewith presented.

Your petitioner respectfully represents that in this cause the validity of the said Ordinance of the City of Hope, passed under authority of the statutes of the State of Arkansas, was called in question, on the ground that it was repugnant to the Constitution of the United States; and the decision was in favor of the validity of the said Ordinance, and against the claim asserted by your petitioner; that in this cause, rights, privileges and immunities were claimed by your petitioner under the Constitution of the United States, and the decision of the Supreme Court of Arkansas was against the claim for such rights, privileges and immunities specially set up under said Constitution.

Your petitioner files herewith its assignment of errors, its prayer for reversal and its bond on writ of error, and prays that a writ of error be allowed to the Supreme Court of the United States to review the said judgment of the Supreme Court of the State of Arkansas, affirming the decree of the Hempstead County Chancery Court and dismissing the bill filed by your petitioner to set aside and restrain the enforcement of the said Ordinance of the City of Hope.

ROSE, HEMINGWAY, CANTRELL,
LOUGHBOROUGH & MILES,
W. E. HEMINGWAY,
Att'y- for Pierce Oil Corporation.

Let the writ of error issue upon execution of bond with security for payment of cost.

E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed Feb'y 5, 1917. W. P. Sadler, Clerk. By J. H. Campbell, D. C.

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42 *Bond on Writ of Error.*

Supreme Court of the United States.

PIERCE OIL CORPORATION, Plaintiff,

v.

CITY OF HOPE, Defendant.

Bond for Writ of Error.

Whereas, the undersigned Pierce Oil Corporation has sued out a writ of error to the Supreme Court of the United States to reverse a judgment rendered against it by the Supreme Court of Arkansas on the 1st day of January, 1917, whereby a judgment of the chancery court of Hempstead County dismissing a complaint filed by it against the City of Hope was affirmed;

Now, Therefore the undersigned hereby undertake to the City of Hope that the said Pierce Oil Corporation shall prosecute its writ of error, and if it fails to make its plea good, shall answer all damages and costs and perform the judgment of the Supreme Court of the State of Arkansas and of the said Chancery Court of Hempstead County.

Witness our hands this 5th day of February, 1917.

PIERCE OIL CORPORATION,
By W. HOLT HARRIS, *Mgr.*
AMERICAN SURETY COMPANY,
[SEAL.] By J. T. TUNNAH, *Agent.*

Approved:

E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed February 5, 1917. W. P. Sadler, Clerk. By J. H. Campbell, D. C.

43 *Writ of Error.*

Supreme Court of the United States.

PIERCE OIL CORPORATION, Plaintiff,

v.

CITY OF HOPE, Defendant.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the

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State of Arkansas before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had on the said suit between the Pierce Oil Corporation and the City of Hope wherein was drawn in question the validity of an Ordinance of the City of Hope passed under the authority of a statute of the State of Arkansas, on the ground of the said Ordinance and statute being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute or commission held under the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed under such clause of the Constitution, treaty, statute or commission; a manifest error has happened to the great damage of the said Pierce Oil Corporation as by its complaint appears. We being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the parties aforesaid
44 in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 5th day of February, in the year of Our Lord one thousand nine hundred and seventeen.

[The Seal of the District Court, Western Division, U. S. A., of East. Dist. Ark.]

SID B. REDDING,
Clerk of the District Court of the United States for the Western Division of the Eastern District of Arkansas,
By W. F. FEILD, Jr., *D. C.*

Allowed by
E. A. McCULLOCH,
Chief Justice of the Supreme Court of the State of Arkansas.

Filed Feb'y 5, 1917. W. P. Sadler, Clerk. By J. H. Campbell, D. C.

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45 *Certificate of Lodgment.*

SUPREME COURT,
State of Arkansas, ss:

I, W. P. Sadler, clerk of the said court, do hereby certify that there was lodged with me as such clerk on February 5th, 1917, in the matter of Pierce Oil Corporation, versus City of Hope.

1. The original bond of which a copy is herein set forth.
2. Copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 7th day of February, 1917.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL,
Deputy Clerk.

46 *Citation.*

Supreme Court of the United States.

PIERCE OIL CORPORATION, Plaintiff,
v.
CITY OF HOPE, Defendant.

To the City of Hope, Greeting:

You are hereby notified and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Arkansas wherein Pierce Oil Corporation is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edgar A. McCulloch, Chief Justice of the Supreme Court of the State of Arkansas, this the 5 day of February, 1917.

E. A. McCULLOCH,
Chief Justice of the Supreme Court of the State of Arkansas.

Service of the above citation is acknowledged.

CITY OF HOPE,
By O. A. GRAVES,
Its Attorney.

Feb'y 5th, 1917.

Filed Feb'y 5, 1917. W. P. Sadler, Clerk. By J. H. Campbell, D. C.

47 *Return to Writ of Error.*

UNTED STATES OF AMERICA,
Supreme Court of Arkansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this February 7th, 1917.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL,
Deputy Clerk.

Costs of Suit.

Costs in the Chancery Court	$6.50
Costs in the Supreme Court	30.50
Making Transcript for the Supreme Court of the United States pursuant to Writ of Error to the State of Arkansas	18.00
Total cost	$55.00

Paid by Pierce Oil Corporation.

W. P. SADLER, *Clerk,*
By J. H. CAMPBELL, *D. C.*

Endorsed on cover: File No. 25,777. Arkansas Supreme Court. Term No. 947. Pierce Oil Corporation, plaintiff in error, vs. The City of Hope. Filed February 19th, 1917. File No. 25,777.

Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

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IN THE

Supreme Court of the United States

PIERCE OIL CORPORATION, *Plaintiff in Error,*

v. No. [redacted]137

CITY OF HOPE, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

W. E. Hemingway,

G. B. Rose,

D. H. Cantrell,

J. F. Loughborough.

Commercial Printing & Office Co., Kansas City

IN THE

Supreme Court of the United States

PIERCE OIL CORPORATION.....*Plaintiff in Error,*

v. No. 410.

CITY OF HOPE.....*Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This case comes here on a writ of error to the Supreme Court of Arkansas. It originated in a suit brought by the Pierce Oil Corporation, herein called the plaintiff, against the City of Hope, herein called the defendant, in the chancery court of Hempstead county, Arkansas, to enjoin the enforcement of an ordinance, recently passed by its council, which forbade the keeping of tanks to store petroleum, or its products, within three hundred feet of a dwelling, store room, building, barn, shed or other like structures, within the limits of the defendant city, in a quantity greater than sixty gallons at one time, it being alleged that the effect of the ordinance would be to require the plaintiff to

dismantle the tanks then kept by it, and to remove them beyond the corporate limits of the city.

The complaint alleged that plaintiff was a Virginia corporation, authorized to do business in Arkansas, and that defendant was an incorporated city of the State of Arkansas; that plaintiff had authority to refine or produce, and to sell the products of petroleum, including oil and gasolene, having succeeded by purchase to the good will, assets and business of the Waters-Pierce Oil Company, which, for many years, had conducted in Arkansas the business of selling petroleum and its products, including oil and gasolene; that its predecessor had, for many years, conducted its business in the city of Hope, by bringing oil from other States in tank cars, conveying it from such cars to storage tanks, and selling it from the storage tanks to patrons in the defendant city and its vicinity. That, when plaintiff succeeded to the business of its predecessor, it continued to carry it on in the defendant city, as had been done by its predecessor. That, for the purpose of so carrying on such business, it had five storage tanks, located on the right-of-way of the St. Louis & San Francisco Railroad, within the defendant city. That, for a great many years its tanks were located on the right-of-way of the Iron Mountain Railroad; but, as the city grew, buildings were erected near their location, and, at the request of the town

authorities, and in accordance with the general plan for the development of the town, the tanks were moved to their present location. At that time, there were no buildings in their immediate vicinity, and their location was fixed to meet the wishes of the city officials and of the people of the town generally. The tanks were constructed of steel, on concrete or brick foundations, with dome vents for the escape of any gas generated in them, which made an explosion impossible and prevented combustion caused by fires from the outside, except of the gas escaping from the vent, which would not be sufficient to extend to any buildings now in the neighborhood, or near the tanks. That, under present conditions, the tanks in no way endanger the buildings or structures nearest them, or any other building or structure in the city, and that they were a necessary adjunct in carrying on the business of selling petroleum products in the defendant city and its vicinity. It is further alleged that the petroleum and its products, stored in said tanks, are brought to the city of Hope in tank cars, and from them conveyed to storage tanks by means of connecting iron pipes; that sales are made by conducting the fluid through an iron pipe from the tanks inside the warehouse, through valves, into delivery cans or iron barrels, from which it is delivered to customers, either in the town or tributary country. That the contents are not exposed in the course of transfer to the storage tanks, or from the storage

tanks to the containers used for deliveries. That the defendant's counsel, by ordinance passed February 1, 1916, made it unlawful to keep or store in tanks, or otherwise, any petroleum, naphtha, benzine, gasolene, coal oil, or any other of the products of petroleum, or any inflammable or explosive oils, gas or substance, within the space of 300 feet of any dwelling house, store room, building, barn, shed or other like structure, within the corporate limits of the city of Hope, in any quantity greater than sixty gallons at one time, with a proviso, that underground tanks may be permitted to carry not exceeding 600 gallons at one time; and it was further provided in the ordinance that every person, firm or corporation violating its provisions should be deemed guilty of a misdemeanor, and, on conviction, fined in any sum not less than $25 nor more than $500, and that each day's violation of the ordinance should constitute a separate offense. (A copy of the ordinance is attached to the complaint and made a part of it.) It is further alleged in the complaint that the ordinance was wholly unreasonable and unnecessary; that it would deprive the plaintiff of property lawfully acquired by it, impose a large unnecessary expense, and reduce the profits to which it was entitled in the conduct of its business; that plaintiff knew of no available location within the city of Hope, at which tanks could be located and oils stored, without violating the provisions of the ordinance. That, although there were

buildings and structures within 300 feet of the tanks, as located, neither such buildings, nor structures, nor persons using them, were in any way imperiled by the presence of the tanks. That, in order to continue its business in compliance with the ordinance, it would be necessary for plaintiff to change the location of the tanks, to move them, and move its warehouse used in connection with them, to erect new piers for the tanks and warehouse, and reset the tanks and warehouse upon such piers. That the cost of such removal would not be less than $800, and possibly more, dependent upon the distance of the new location from the old. It is further alleged, that the plaintiff had a lease from the St. Louis & San Francisco Railroad, authorizing it to maintain its tanks at the place of their present location, for a nominal consideration. That the tanks are so located that tank cars can be placed beside them, so as to transfer the contents by means of pipes to the storage tanks, without the cost of drayage or switching charges. That, if plaintiff is required to remove its tanks, the value of its lease and present location would be entirely destroyed. That its business at Hope amounts to about one tank car a month, and it would be impracticable to carry it on without the use of storage tanks so located as to receive the product directly from tank cars in the manner above set out. That, if plaintiff is required to abandon its present location, it knows of no place where it can get an-

other with the same, or equal, facilities. To do so would require a large expenditure of money. That, after the adoption of the ordinance, plaintiff stopped sales from storage tanks, and carried on its business, and made its sales, from barrels and other small retainers, which has imposed an additional cost of at least seventy-five cents per barrel of all products sold, and it has amounted to approximately $75 per month. That if business was done from tanks located outside the city limits, deliveries would involve a longer haul from the place of storage to the purchaser, with an additional expense of not less than $25 per month. That, although the enforcement of the ordinance is wholly unnecessary to the security of life or property, and the location of the tanks and their use by the plaintiff does no damage to either person or property within the city of Hope, the defendant threatens to stop it, and to have the agents and employees of the plaintiff, and the drivers of its wagons, arrested for a violation of its ordinance, unless the plaintiff complies with its provisions on or before July next ensuing. That its enforcement would seriously interfere with the conduct of plaintiff's business, put it to great unnecessary expense, and deprive it of its property and of the profits to which it is entitled in the conduct of its business, without in any way promoting the safety of the inhabitants of the defendant city, or their property; that the ordinance violates the provisions of the Fourteenth Amendment of

the Constitution of the United States, and deprives the plaintiff of its property without due process of law. The plaintiff, therefore, prayed for an injunction to restrain the enforcement of the ordinance. (Complaint, transcript, pages 2-5; ordinance, transcript, pages 5, 6.)

The defendant filed a general demurrer to the complaint (Tr. 6, 7). The demurrer was sustained, and the plaintiff electing to stand by its complaint, the cause was dismissed, and plaintiff appealed to the Supreme Court of Arkansas, which, upon a hearing, affirmed the judgment of the chancery court (Tr. 7).

The plaintiff, thereupon, filed its petition for a writ of error, with its assignment of errors, and the same was allowed by the Chief Justice of the Supreme Court of Arkansas.

ASSIGNMENT OF ERRORS.

The plaintiff assigns as error, and relies for reversal, on the ground that the judgment sustaining the ordinance will deprive it of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

BRIEF.

The controversy in this case is confined within a very narrow compass. There was a demurrer to the complaint, which admitted, as true, all allegations of fact it contained. The demurrer was sustained, and the cause reaches this court upon the single question whether the allegations of the complaint show that plaintiff has been deprived of its property without due process of law.

Reduced to a final analysis, the complaint charges that the maintenance of plaintiffs storage tanks, as then located, did not endanger persons or buildings near it. That there was no reason to require a removal of them, and that such requirement destroyed the value of the lease of ground on which they were situated; that it put plaintiff to the expense of removing and re-erecting them, and of acquiring ground upon which to rebuild them; and further, that it would increase the cost, and reduce the profit, of conducting its business.

In the face of these allegations, the Supreme Court of Arkansas held that the city council acquired authority to pass the ordinance under three different sections of the statutes; one of which conferred authority "to prevent injury or annoyance within the limits of the corporation from anything offensive or unhealthy;" another of which conferred authority to "regulate the keeping and transportation of gun powder, dynamite

and other combustibles, and to provide and license magazines for the same;" and the third of which gave power "to make regulations for the purpose of guarding against accidents by fire."

Insofar as this is an interpretation of Arkansas statutes, we assume that it is final, and that this court will regard it as settled; but if it were the act of the Legislature itself, the question of its validity, when properly attacked, is one for the decision of the courts.

Covington Turnpike Road Case v. Sandford, 164 U. S. 578.

Lochner v. New York, 198 U. S. 59.

The action of a city, under authority from the Legislature, is equally subject to judicial scrutiny and annulment.

Dobbins v. Los Angeles, 195 U. S. 223.

Although the complaint charged, in detail, that the ordinance was wholly unnecessary and unreasonable, and that the plaintiff's storage tanks caused no danger to persons or property near them, and that the requirement to remove them subjected plaintiff to great pecuniary loss; and although the truth of these allegations was admitted by demurrer, the court, in effect, held that there was an irrebuttable presumption in favor of the validity of the ordinance, and denied to the plain-

tiff an opportunity to prove the truth of this charge. We earnestly urge in behalf of appellant that the facts charged bring the plaintiff clearly within the doctrine of Dobbins v. Los Angeles, 195 U. S. 293, and entitle it to a favorable judgment in this court.

In the case last referred to, after stating that every intendment is to be made in favor of the lawfulness of the exercise of the municipal power making regulations to promote public health and safety, the court says (page 236):

"But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business, to make contracts, or to use and enjoy property. In Lawton v. Steele, 152 U. S. 133, 137, Mr. Justice Brown, speaking for the court, said upon this subject:

" 'To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished

from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.' "

It will be observed that the conditions upon which a State or city government may interfere with the prosecution of a lawful business are, first, that public interests require such interference; and, second, that the means employed are reasonably necessary for its accomplishment, and not unduly harmful to the interests of individuals. It will be further seen that the existence of each of these conditions is expressly negatived by the allegations of the complaint; and that by the decision of the State court relief is denied on any proof that might be made that they did not exist.

Whether the facts stated in the complaint make a *prima facie* case, invalidating the ordinance, because it deprives plaintiff of its property without due process of law, contrary to the due process clause of the Fourteenth Amendment, is a question for the determination

of this court, unaffected by the decisions of the Supreme Court of the State.

Covington, etc., v. Sandford, 164 U. S. 578, 595.

In Lochner v. New York, *supra,* the court uses this language:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition; otherwise, the Fourteenth Amendment would have no efficacy, and the Legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State, to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is conferred, and where the protection of the Federal Constitution is sought, the question necessarily arises, Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual? * * *

"This is not a question of substituting the judgment of the court for that of the Legislature. If the act be within the power of the State, it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But, the question would still remain, Is it within the police power of the State? and that question must be answered by the court."

Continuing further, the court holds that the mere assertion that the subject relates to the public health does not necessarily authorize the enactment. That the act must have a more direct relation as a means to an end, and the end itself must be appropriate and legitimate before an act can be held to be valid, which interferes with individual rights. Throughout this opinion, as throughout the other opinions referred to, the essentials are shown to be the existence of a public necessity and the reasonable adaptation of the means employed to the end to be accomplished.

We respectfully submit that, according to the allegations of the complaint, there was no public necessity for the ordinance, and that it is not reasonably adapted to protect the public against fires or other harm. And if we are right in this we submit, further, that plaintiff

was entitled to protection against the enforcement of the ordinance, and that the decree of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

W. E. HEMINGWAY,

G. B. ROSE,

D. H. CANTRELL,

J. F. LOUGHBOROUGH,

For Plaintiff in Error.